UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RITE AID OF NEW YORK, INC., AND RITE AID OF NEW JERSEY, INC., Respondents, -and- 1199SEIU UNITED HEALTHCARE WORKERS EAST, Union.	Case No. 02-CA-160384

RESPONDENTS, RITE AID OF NEW YORK, INC. AND RITE AID OF NEW JERSEY, INC.'S BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondents Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc. (collectively "Rite Aid") submit this Brief in Support of its Exceptions to the November 30, 2016 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Steven Davis in favor of the Charging Party, 1199 SEIU United Healthcare Workers East ("Union"). Rite Aid excepts to the ALJ's finding that Rite Aid violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"). (D. 24:4-7).[1]

I. INTRODUCTION

There is no dispute of material facts. The ALJ makes no credibility findings. The undisputed facts of this case establish:

- The Parties were not at impasse, which the General Counsel concedes;
- Rite Aid's New York pharmacies required additional supervision, and;
- Rite Aid proposed that future Staff Pharmacists and Interns perform supervisory and management responsibilities.

The ALJ ignores these facts and improperly eviscerates Rite Aid's right under the NLRA to manage its business and engage in good faith negotiations**.** This Decision must be reversed.

Parties were in midstream of negotiations at the time of this case. Counsel for the General Counsel conceded on the record that no overall impasse existed. (Tr. 32:16-24). Given that concession, any further conclusions or analysis by the ALJ is inappropriate – a party can insist on

[1] "(D. __)" references the Decision by page and line numbers, "(Tr. __)" references cites to the official hearing transcript page, "(Er. Ex. __)" refers to Employer exhibits submitted during the hearing, ("Bd. Ex. __) refers to the Board Exhibits submitted during the hearing, and "(U. Ex. __)" refers to Union exhibits submitted during the hearing.

a permissive subject of bargaining so long as they are not at an overall impasse. *See Latrobe Steel v NLRB*, 630 F.2d 171, 179 (3rd Cir. 1980) (finding that a party cannot insist upon a non-mandatory subject to an overall impasse). Even without the concession there is no question that the Parties were not at impasse. The ALJ heard uncontradicted evidence that the Parties bargained successfully on a wide range of subjects. Counsel for the General Counsel introduced no evidence that bargaining was frustrated by the presence of Rite Aid's proposal – indeed, Rite Aid solicited new proposals from the Union at the last bargaining session on the record. (D. 12:45-50).

The ALJ finds that Rite Aid committed an unfair labor practice by insisting on a permissive subject of bargaining even in the absence of an overall impasse. (D. 19:39-41). This finding relies on a flawed analysis of the law and the record. Nothing prevents an employer from linking mandatory and permissive subjects of bargaining so long as the permissive subject is not a "condition precedent" to an overall agreement. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). There is also no evidence that Rite Aid conditioned any proposal on a permissive subject. Rite Aid was seeking an offset to the extreme cost increase of the Union's health insurance proposal, and the Union refused over to either offer any ideas for an offset of the cost or other alternative. Rite Aid is not required to bargain with itself and in good faith was engaging in hard bargaining.

Nor does the record support a finding that Rite Aid conditioned any mandatory proposals on the Union agreeing to Rite Aid's transfer of work proposal. Rather, Rite Aid made clear that it would not agree to the Union's extraordinarily costly health insurance proposal without a financial offset elsewhere in the contract. Rite Aid explained that it could tolerate the escalated cost if the Union agreed to Rite Aid's package of business proposals, including the transfer of bargaining unit work. The Union rejected this proposal, but refused to supply an alternative or acceptable counter proposal. Given the lack of an alternative from the Union, Rite Aid continued to offer its original

proposal as a potential path to an agreement. This is hard bargaining by Rite Aid and not an unfair labor practice.

Additionally, the ALJ's erroneous interpretation of Board precedent equates this straightforward proposal for transfer of work with a change in the scope of the bargaining unit – resulting in a ruling which, if upheld, effectively makes *any* transfer of work impossible and unlawful. The ALJ's decision severely restricts the ability of an employer to even discuss the subject at all.

The ALJ fails in his scattershot Decision to articulate the distinction between a transfer of work and an alteration in the scope of the unit. The ALJ's Decision requires Rite Aid to prove that supervisory associates do not perform any bargaining unit work, and that Rite Aid display an "actual, demonstrated" need for additional supervision *according to the ALJ's own business judgment*. (D. 18:32-35). This is not the applicable legal standard. The U.S. Court of Appeals for the D.C. Circuit recently refused to enforce a Board decision employing the ALJ's standard, holding that such a standard renders the "Board's line of cases distinguishing between work transfers and bargaining unit changes…meaningless." *Aggregate Industries v. NLRB*, 824 F.3d 1095, 1102 (D.C. Cir. 2016).

The NLRB has sanctioned proposals markedly similar to Rite Aid's proposal at issue here. When, as here, the bargaining unit is described in the collective bargaining agreement in terms of job classifications, the Board's analysis is straightforward. The employer may assign bargaining unit work to non-unit employees, or the employer can assign supervisory work to unit employees and remove them from the bargaining unit. The only limitation is that the proposal must be made in good faith and not a sham. The ALJ's factual findings in his Decision establish Rite Aid's legitimate need for additional supervision and they provide the factual predicate for a finding that Rite Aid's proposal was made in good faith.

Accordingly, for the reasons set forth herein, Rite Aid respectfully requests that the Board reverse the ALJ's Decision and dismiss the General Counsel's complaint in its entirety, with prejudice.

II. FACTS AND BACKGROUND

A. The Record Establishes that Rite Aid Linked its Transfer of Work Proposal With the Union's Health Benefits Proposal

The Union's top priority in bargaining was retaining the health insurance benefits provided and administered by the National Benefit Fund (the "NBF"). (Tr. 191:1-8). Rite Aid contributes to the NBF based on its gross monthly payroll. (Tr. 191:18-25). The percentage contribution is set by the League of Hospitals. (Tr. 191:1-8). Due to an increase in the contribution percentage rate by the League of Hospitals, Rite Aid estimates that it will owe an additional $35 million in benefits over the life of a four-year contract with the Union. (Tr. 191:18-21). The total additional contribution amount is over three times as much as Rite Aid currently contributes. (Bd. Ex. 16 at RA000640). One of Rite Aid's priorities at bargaining was offsetting this cost elsewhere in the contract. (D. 5:11-16). To that end, Rite Aid proposed a package of business initiatives, which included its transfer of work proposal, as an acceptable offset to the cost of the NBF. (D. 9:48-50).

B. The Record Establishes Rite Aid's Need for Additional Supervision at its New York Pharmacies

Rite Aid's proposal assigns supervisory and management job duties to future Staff Pharmacists and Interns at Rite Aid of New York, Inc. locations, in addition to their current bargaining unit work of dispensing medication, speaking with doctors, and interacting with patients. This proposal concerns the work performed by bargaining unit associates – over which the Union admits it has an obligation to negotiate. (Tr.138:1-12 – Allyson Belovin). The Parties' 1998 collective bargaining agreement (the "1998 CBA") excludes statutory supervisors, and thus,

future Staff Pharmacists and Interns, as supervisors, would be excluded from the bargaining unit on a going forward basis. The Union may be displeased with the result, but it has a duty to bargain with Rite Aid over this mandatory subject of bargaining.

The supervision challenges affecting Rite Aid's New York pharmacies are undisputed. The vast majority of Rite Aid's pharmacies employ one Pharmacy Manager, one Staff Pharmacist, and several Pharmacy Technicians and Pharmacy Cashiers. (D. 3:43-45). Staff Pharmacists and Pharmacy Managers perform traditional pharmacist work, including speaking to doctors, checking prescriptions, and interacting with customers. (D. 3:35-37).

The Parties' 1998 collective bargaining agreement, as set forth in the 2009 Memorandum of Agreement which modified the 1998 contract, (the "CBA") defines the bargaining unit as consisting of:

> [A]ll of the professional and nonprofessional employees of the Employer in the drug stores set forth in Article 1 hereof, [the coverage clause of the contract such as certain counties in New York and certain counties in New Jersey but excluding staff pharmacists and supervising pharmacists from the unit] but excluding guards, store managers, co-managers, pharmacy managers, supervising pharmacists, pharmacists-in-charge, New Jersey staff pharmacists and pharmacy interns, and supervisors as defined by the National Labor Relations Act, as amended, in respect to rates of pay, wages, hours and other conditions of employment.

(D. 2:26-36). Pharmacy Managers, who supervise the pharmacy, are excluded from the bargaining unit under the terms of the recognition clause. (Tr. 167:20-25). Notably, the position of Staff Pharmacist is not specifically included in the bargaining unit, although New York Staff Pharmacists have traditionally been included as non-supervisory, professional employees. (D. 2:25-36).

Pharmacy Managers and Staff Pharmacists work opposite shifts. (D. 3:39-41). Rite Aid's inability to supervise its associates when the Pharmacy Manger is off-duty "could be very disruptive to the pharmacy's workflow." (D. 3:fn. 1). Staff Pharmacists represented by the Union

"would be unable to discipline or counsel another employee represented by the Union." (D. 4:1-4). This causes problems when the Pharmacy Manager is absent, because there is "no direct supervision in the pharmacy." (Tr. 165:12-17 – Gordon Hinkle). Pharmacy Managers and the Staff Pharmacists work opposite days and rarely overlap shifts, so in effect there is no supervision for the Staff Pharmacist's entire shift. (Tr. 164: 1-9). Any issue that requires management intervention has to wait until the Pharmacy Manager returns, possibly days later. (Tr. 165: 12-17). Additionally, if Rite Aid wants to initiate new programs for its pharmacy staff, such as a wellness or patient outreach program, they first must negotiate the changes with the Union. (Tr. 166: 9-15). This increasingly impacts New York stores because the pharmacy business is increasingly focused around such initiatives, and increased competitiveness overall requires that Staff Pharmacists take a larger role in management of the store and run more outreach programs. (Tr. 163: 12-21). In recent years, as the industry has shifted towards wellness and a more preventative approach to patient health issues, Staff Pharmacists must also interact more with customers, run outreach programs, participate in wellness fairs, and administer immunizations. *Id.* At Rite Aid of New York, Inc. locations, Staff Pharmacists must do so without the ability to supervise or manage their pharmacy staff.

Rite Aid had for years sought to address this problem with the Union. (D. 3:15-19). Because the pharmacy business is shifting from "counting pills and filling prescriptions" to a model based on community outreach and medical therapy management, Staff Pharmacists need to assume additional supervisory and management responsibilities. (D. 3:31-37).

At Rite Aid of New Jersey, Inc., and at nearly every other Rite Aid location in the country, Staff Pharmacists also supervise the pharmacy. (Tr. 166: 3-16). They counsel, discipline, hire, and fire associates, and lead company initiatives and health programs designed to provide

proactive healthcare to customers. *Id.* Staff Pharmacists are considered part of management. (Tr. 151: 3-10).

C. The Record Establishes that Rite Aid Proposed for Future Pharmacists to Perform Supervisory Functions

The terms of Rite Aid's proposal are likewise not in dispute. Negotiations between the Parties over a new collective bargaining agreement began on March 31, 2015. (D. 2:45-46). The ALJ accurately described how on the first day of bargaining Rite Aid proposed to have future pharmacists "leading their stores and undertaking supervisory responsibilities." (D. 3:26-30). Rite Aid made this proposal as a result of the business "growing in different directions" and the need to "have its pharmacists involved with hiring, firing, disciplining and directing other pharmacy employees, and also act as managers in dealing with 'wellness initiatives' including counseling of patients, handling customer issues, scheduling, performing outreach into the community and medical therapy management…" (D. 3:31-36). The Union acknowledges that Rite Aid explained how, "at the first session, among other things that were said about the proposal, was that Rite Aid wanted the pharmacists to be treated as managers." (Tr. 123: 11-15 - Allyson Belovin). Future Staff Pharmacists would be expected to perform these new functions in addition to performing traditional pharmacist work, such as "counting pills and filling prescriptions." (D. 3:35-37).

The Union flatly rejected Rite Aid's proposal and explicitly stated that it was "not something we are willing to entertain." (D. 4:4-8). Nevertheless, Rite Aid continued to explain to the Union that "the stores must be managed and pharmacists needed to act as managers" and that "the management role that pharmacists should have was inconsistent with their being union members, and that…pharmacists [should] take on supervisory roles." (D. 11:1-6).

III. ARGUMENT

A. The ALJ Erred in Holding that Rite Aid's Transfer of Work Proposal Rose to the Level of an Ultimatum

The record does not support the ALJ's finding that Rite Aid insisted on the inclusion of its Staff Pharmacist and Pharmacy Intern proposal as a "condition of its agreeing to a contract…". (D. 21:23-25).

The ALJ does not point any evidence in the Record which establishes or supports a finding that Rite Aid engaged in anything other than hard bargaining. The ALJ correctly acknowledges that at the first bargaining session, Traci Burch, Rite Aid's chief spokesperson, informed the Union that the transfer of work proposal "was a business initiative in which it sought to (a) save money to offset the costs of the [NBF]…". (D. 3:20-24). The next day, Ms. Burch asked the Union for alternative proposals "regarding the cost of the NBF." (D. 5:11-16). Over the course of bargaining, Rite Aid tried to solicit other alternative proposals from the Union, including the possibility of employee contributions to the NBF. (D. 13:5-13). Rite Aid offered a package of business proposals, including the transfer of work proposal, as another potential offset. (D. 8:49-53). The Union rejected Rite Aid's alternative proposals, and did not offer any counter or original offset proposals of its own.

Repeatedly offering an offset is not an ultimatum. Rite Aid is not required to bargain with itself by continually offering different proposals to counteract the extreme cost escalation of the NBF. Rite Aid's position was that an acceptable compromise was its business initiatives in exchange for the Union's NBF proposal. (D. 9:48-50). Ms. Burch informed the Union at the July 15, 2015 session that "[w]e are not willing to sign up for that kind of increase. We are very happy to work with the union to figure out a way to preserve the benefits, we can't sign up for this package that's the genesis of this." (Bd. Ex. 16 at RA000597). This aligns with Rite Aid's stated posture

that, since it could not agree to the NBF without an offset, it would continue to push for an acceptable compromise.

The ALJ held that Rite Aid crossed the line into delivering an ultimatum when, on November 17, 2015, David Gonzalez, one of Rite Aid's spokespeople, informed the Union that Rite Aid's economic proposal was "contingent upon agreement by the Union to all three of Rite Aid's business initiatives." (Tr. 98:18-24). When Mr. Gonzalez referred to an agreement, he was referring to an agreement on the Union's proposal to remain in the NBF "as is" at the $35 million increase. (Bd. Ex. 16 at RA000641). Subsequent negotiation sessions reveal that Rite Aid continued to ask the Union for alternatives in lieu of the future pharmacist proposal. On December 15, 2015, the next negotiation session, Mr. Hinkle testified that he informed the federal mediator present that "it was completely about offsetting the cost." (Tr. 202:11-18 – Gordon Hinkle). And at the following session on March 29, 2016, Ms. Burch clarified Rite Aid's position to the Union. Ms. Burch stated that because "[t]he union has not provided support on our business initiatives, we are wondering what other options do we have like NBF." (Bd. Ex. 16 at RA000648).

The ALJ also states, without support or citation to the record, that the Union "also asked the Respondent if it would make any other offer that did not include the exclusion of the future pharmacists and interns from the unit and the Respondent replied that it would not." (D. 19:25-29). It is unclear what the ALJ is referring to, but his recollection of the record is incorrect. At the September 16, 2015 bargaining session, the Union asked "whether a contract settlement was possible" within certain parameters, which included the NBF as-is. (D. 9:48-50). Rite Aid replied that it "needed all three initiatives."[2] *Id*. This is plainly not an insistence on the business initiatives

[2] In his Decision, the ALJ mistakenly attributes this comment to the March 29, 2016 session. This is not reflected in the transcript.

as the price of an agreement – it is the rejection of a Union proposal which did not adequately address Rite Aid's cost concerns.

In the absence of any Union alternative proposal, Rite Aid continued to press its own business initiatives as an acceptable compromise package. The Union cannot demonstrate that Rite Aid would have rejected all alternative proposals, because it never offered any and flat out refused to bargain over anything but the NBF "as is". The ALJ's finding that Rite Aid illegally insisted over its proposal is wrong and must be overturned.

B. The ALJ Erred By Finding that Rite Aid Insisted on a Permissive Subject of Bargaining When No Impasse Existed

Counsel for the General Counsel acknowledged that, at all times relevant to this Decision, there was no impasse and that "bargaining continues." (Tr. 32:16-24). Counsel for the General Counsel further admitted that Rite Aid did not insist on its Staff Pharmacist proposal to impasse. (Tr. 6:5-9). These admissions end the case. The U.S. Supreme Court held in *NLRB v. Borg-Warner Corp.* that while "each party is free to bargain or not to bargain, and to agree or not to agree" over non-mandatory subjects, a party commits an unfair labor practice when it insists upon a permissive subject "as a condition to any agreement." *NLRB v. Borg-Warner Corp.*, 357 U.S. 342, 350 (1958). Because Rite Aid and the Union were not at impasse, it is impossible for the ALJ to find that Rite Aid made its Staff Pharmacist and Pharmacy Intern proposal a "condition of it agreeing to a contract…" (D. 21:23-25).

To support his finding that Rite Aid did commit an unfair labor practice, the ALJ relies on the Board's decision in *Smurfit-Stone Container*, 357 NLRB 1732 (2011), for the holding that:

> The Board has long held that it is unlawful for a party to condition its agreement concerning a mandatory subject of bargaining on the union's consent to a nonmandatory subject.

(D. 19:39-41). In *Smurfit-Stone Container*, the employer offered to agree to a mandatory subject of bargaining only on the condition that the union agree to a permissive subject. 357 NLRB at 1736. The Parties continued bargaining for several sessions before reaching an impasse. *Id*. The Board held that the employer committed an unfair labor practice the moment it conditioned a permissive subject on a mandatory subject, even though no overall impasse existed. *Id*. In so doing, the Board held that "the proper legal test in this case for unlawful insistence under *Borg-Warner* is whether agreement on the mandatory subjects of bargaining was conditioned on agreement on the nonmandatory subject of bargaining." *Id*. This holding contradicts a long line of Board cases. It radically expands the Supreme Court's decision in *Borg-Warner* and effectively bans any hard bargaining over nonmandatory proposals. The Board should not apply the holding in *Smurfit-Stone* to this case.

Prior to *Smurfit-Stone*, the Board and the courts interpreted *Borg-Warner*'s to ban a party from insisting on a permissive subject of bargaining to the point of impasse *over the agreement as a whole*. In *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999) the Board held that "the mere fact of impasse coincidental to continued disagreement on a nonmandatory subject of bargaining will not trigger the *Borg-Warner* unfair labor practice." In *District 50, United Mine Workers of America*, 142 NLRB 930, 939 (1963), relied upon by the ALJ in his Decision, the administrative law judge found an unfair labor practice only because the union's insistence on its permissive subject resulted in "good-faith bargaining never [getting] started and an impasse has taken place in bargaining." Likewise, in *National Fresh Fruit and Vegetable Company and Quality Banana Co., Inc.*, 227 NLRB 2014, 2017 (1977), the Board only found an unfair labor practice when the parties had reached an overall impasse, resulting in a strike, and the permissive subject "prevented [the parties] from reaching agreement…" Given the lack of impasse present in this case, under any of these decisions the Board would find that Rite Aid did not commit an unfair labor practice.

The ALJ himself acknowledges the reason for the Board's pre-*Smurfit-Stone Container* rulings. It is "well established that a party "ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum." (D. 20:20-23) (quoting *Longshoreman ILA v. NLRB*, 277 F.2d 681, 683 (D.C. Cir. 1960); *see also Latrobe Steel v NLRB*, 630 F.2d 171, 179 (3rd Cir. 1980) (expressing "grave doubts" as to the "usefulness of the concept of 'impasse' as a level of disagreement over a single issue where that issue is a non-mandatory subject of bargaining…what *Borg-Warner* prohibits is insistence upon a non-mandatory subject as a condition precedent to entering an agreement."). The Act does not limit bargaining to mandatory subjects. It permits, and encourages, both sides to bargain over all legal subjects to their fullest extent, so long as a permissive subject does not lead to an overall impasse. *Smurfit-Stone Container*, by contrast, completely bans an employer from linking a permissive and a mandatory subject, even if the union still wishes to bargain. The stated purpose of the Act is to "encourage[e] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of . . . employment." 29 U.S.C. § 151. *Smurfit-Stone Container* serves only to frustrate bargaining. This holding undermines the ability of the employer to engage in bargaining, breaks sharply with long established Board precedent, and cannot stand.

Even setting aside Counsel for the General Counsel's admission regarding the lack of impasse, the record obviously supports a finding that no impasse existed. Rite Aid at no point refused to negotiate or to reach an agreement due to its Staff Pharmacist and Pharmacy Intern proposal. The ALJ finds that Rite Aid issued an ultimatum when, on November 17, 2015, David Gonzalez said that Rite Aid's proposal was "contingent" on the Union agreeing to three of Rite

Aid's business initiatives. (D. 20:25-31).[3] Yet the record shows that the Parties continued to negotiate, and indeed reached a tentative agreement on wages at the next session on December 15. (D. 45-46). Again, Mr. Gonzalez's reference to an agreement was to accept the Union's proposals to remain in the NBF "as is" at the $35 million increased cost. (Bd. Ex. 16 at RA000641). As late as March 29, 2016, the last session on the record, Rite Aid was inquiring about alternative proposals to the Union's health insurance plan. (D. 13:5-12). Finally, even assuming an impasse exists, which is plainly not the case, any impasse resulted not from Rite Aid's proposal, but from the Union's insistence on its NBF proposal. *See Latrobe Steel v NLRB*, 630 F.2d 171, 181 (3rd Cir. 1980) (finding no unfair labor practice where the "impasse would have occurred even absent the party's insistence on the non-mandatory proposals"). Rite Aid made it clear to the Union that no agreement could be reached if the Union continued to insist on its highly expensive NBF proposal. (D. 12:25-30). Even had Rite Aid removed its transfer of work proposal, the Parties could not immediately reach an agreement so long as the Union maintained its NBF proposal.

In the absence of an impasse, the ALJ cannot legally find that Rite Aid committed an unfair labor practice.

C. Rite Aid Proposed a Transfer of Bargaining Unit Work Which is a Mandatory Subject of Bargaining

The ALJ fails to utilize an appropriate standard for distinguishing between a transfer of work and a change in the scope of the unit. The facts relied upon by the ALJ in reaching his Decision are not in dispute. To the extent the ALJ manages to identify a standard, the results only blur the lines between the two types of proposals to such an extent that it grants the ALJ unlimited discretion to substitute his own business judgment for Rite Aid. Respondent does not challenge

[3] Mr. Gonzalez played a minor role in negotiations with only an occasional speaking role.

the ALJ's credibility determinations. Rather, it contends that the facts as determined by the ALJ do not support his conclusions. Accordingly, *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), is not controlling.

The difficulties in distinguishing between a proposal to transfer work and one to change the scope of the bargaining unit arise when the bargaining unit is defined in terms of the work it performs. *Hill-Rom Co. v. NLRB*, 927 F.2d 454, 456 (7th Cir. 1992) (Easterbrook, J., dissenting). Any transfer of work analysis therefore must begin with the recognition clause. In *Aggregate Industries v. NLRB*, 824 F.3d 1095 (D.C. Cir. 2016), the D.C. Circuit, in a division reversing the Board's holding that a transfer of work altered the scope of the unit, held that:

> But when the bargaining unit is **not defined in terms of the work the employees perform**, the distinction is not so evanescent. In that situation, **transferring work out of the unit does not necessarily change the unit's scope, and characterizing an employer's action is more straightforward**. That is what we have here.

Id. at 1101-1102 (emphasis added). Here too, the collective bargaining agreement between Rite Aid and the Union defines the unit in terms of job classifications.

Next, the analysis turns to whether the proposal actually transfers bargaining unit work. The Board approves proposals covering the transfer of work in different forms. Sometimes, the employer's proposal assigns supervisory responsibilities to bargaining unit employees, in effect promoting them to supervisors excluded from the bargaining unit, as in *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 544 (1993). The employer can also propose to create entirely new, non-unit supervisory positions and assign those supervisors work traditionally included in the bargaining unit, as in *Hampton House*, 317 NLRB 1005 (1995). So long as the transfer of work proposal is not a "sham" or "merely retitl[ing] bargaining unit employees who, despite the classification change, would merely have continued to perform solely bargaining unit work", the Board will find that the scope of the unit remains unchanged. *Bridgeport*, 313 NLRB

at 544. The Board's standard acknowledges the prerogative of the employer to make a mandatory bargaining proposal to create and fill supervisory positions according to its business judgment, even if the end result diminishes the size of the bargaining unit. *See Aggregate Industries*, F.3d at 1102. Triers of fact "may not simply substitute [their] own subjective judgment of what we would have done were we in the Respondent's position." *Id*. at 545.

Rite Aid's proposal mirrors the proposals for transfers of work upheld by the Board. The recognition clause defines the unit in terms of job classifications (and does not mention a Staff Pharmacist position). (D. 2:25-36). Rite Aid outlined a clear need for additional supervision in its New York pharmacies. (D. 3:fn. 1); (D. 3:25–4:2). Rite Aid proposed that future Staff Pharmacists "continue to perform their regular work while, in addition, they would perform supervisory duties." (D. 16:19-24). The ALJ claims that Rite Aid's negotiators never explicitly referred to their proposal as a transfer of work. (D. 16:19-22). The ALJ's assertion improperly focuses on form over the substance of the proposal. There are no 'magic words' needed for a proposal to be considered a transfer of work. The ALJ acknowledges that Rite Aid introduced its proposal by stating that pharmacists should be "leading their stores and undertaking supervisory responsibilities" and that over the course of bargaining Rite Aid described how future Staff Pharmacists needed to be involved with "hiring, firing, disciplining, and directing other pharmacy employees, and also act as managers…" (D. 3:25-40). Rite Aid plainly made the intent of its proposal clear, even if it did not use the exact terminology. Again, the Union admitted that "at the first session, among the other things that were said about the proposal, was that Rite Aid wanted the pharmacists to be treated as managers." (Tr. 123:13-15).

This plainly goes beyond "merely retit[ling]" a bargaining unit classification. *Bridgeport*, 313 NLRB at 544. Rite Aid proposed a transfer of work, and the bargaining unit's scope remains

unchanged.[4] Rite Aid is only obligated to bargain over this proposal because it assigns work – counting pills and filling prescriptions – previously performed by unit employees to future non-unit supervisors.

D. The ALJ Erred in Holding that Rite Aid Merely Reclassified the Staff Pharmacist Position

Midway through his Decision, the ALJ states:

> Where the employer effectively eliminates positions by reclassifying unit, nonsupervisory positions as supervisory positions in order to remove them from the bargaining unit, the employer alters the scope of the unit.

(D. 17:5-7). The ALJ does not define what constitutes reclassifying, but he appears to conclude that because future, supervisory, non-unit Staff Pharmacists will "continue to perform their regular work, while, in addition, they would perform supervisory duties", Rite Aid's proposal is essentially a ruse to eliminate a bargaining unit position rather than a good faith proposal to transfer bargaining unit work. *Id*. This novel legal standard has no basis in the case law and ignores contradicted testimony that existing Staff Pharmacists remain in the bargaining unit. (D. 5:25-26). Indeed, if a newly promoted or hired supervisor cannot also perform bargaining unit work, it is unclear how *any* transfer of work proposal would satisfy the ALJ's test.

The ALJ cites *Facet Enterprises v. NLRB*, 907 F.2d 963, 975-976 (10th Cir. 1990). In that case, the Tenth Circuit held that an employer cannot "under the guise of the transfer of unit work…alter the composition of the bargaining unit." *Id*. To the ALJ, if an employee continues to perform bargaining unit work once he is removed from the unit, the proposal is a guise to alter the scope of the unit. But the *very next line* makes clear that "[w]here the duties of the newly-

[4] The ALJ assumes that Rite Aid's proposed change to the recognition clause automatically proves a violation. (D. 16:48-50). The Board holds that a "specific job" included within the scope of the unit cannot be unilaterally removed. *Holy Cross Hospital*, 319 NLRB 1361, 1361 (1995). The Staff Pharmacist position is not specifically included in the bargaining unit recognition clause. Even assuming that Rite Aid's recognition clause proposal alters the scope of the unit, Rite Aid's proposal to give supervisory job responsibilities to Staff Pharmacists is still a mandatory transfer of work.

designated out-of-unit employees are substantially similar to those of the unit employees, the transfer may be a sham…". *Id.* "Substantially similar" does not mean there can be no overlap in job duties for new, out-of-unit supervisors. In *Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 458 (7th Cir. 1992), the Seventh Circuit upheld a transfer of work as proposed in good faith where 75% of the job responsibilities of the newly-designated out-of-unit employee remained the same. Rite Aid's proposal requires future Staff Pharmacists to perform bargaining unit work, but with significant supervisor and management duties. In the present case, there is a significant distinction in the duties that newly hired Staff Pharmacists would have and those which present Staff Pharmacists have. The evidence as to this is uncontradicted. (D. 3:31-36).

The ALJ tries to argue that *Bridgeport* "stands for the proposition that the promotion of unit employees to supervisory positions" is a mandatory subject when the employees "perform **purely supervisory duties**…" 313 NLRB at 544 (emphasis added). This is not the holding of *Bridgeport*. Nowhere in that decision is it stated that the bargaining unit ship captains whom the employer promoted to supervisory status no longer performed their old bargaining unit work. The Board does not suggest such an impossible standard. Rather, the proposal *did not* alter the scope of the unit so long as the employer "did not merely retitle bargaining unit employees" but had them perform "supervisory tasks and imbued them with the authority of statutory supervisors…" *Bridgeport*, 313 NLRB at 544. The ALJ's reading of *Bridgeport,* is fatally flawed, and it is the core of his decision. Indeed, the ALJ ignores cases on point which approve of mandatory bargaining proposals on transfer of work where duties overlap. *See Regal Cinemas, Inc.* 334 NLRB 304 (2001) (holding that "the reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining" even when all bargaining unit employees are discharged); (*Hampton House*, 317 NLRB 1005 (1995) (employer promoted

bargaining unit associates to a new, non-unit supervisory position where they performed similar work).

In Rite Aid's case, future Staff Pharmacists will perform similar work to bargaining unit Staff Pharmacists. But they will also perform substantially different duties, including "hiring, firing, disciplining and directing other pharmacy employees, and also act as managers in dealing with 'wellness initiatives' including counseling of patients, handling customer issues, scheduling, performing outreach into the community and medical therapy management…" (D. 3:31-36). This goes far beyond a mere reclassification of a pre-existing position of the cases relied on by the ALJ (*See Holy Cross Hospital*, 319 NLRB 1361 (1995); *Mt. Sinai Hospital*, 331 NLRB 895 (2000)). On this basis alone, the ALJ's Decision must be overturned.

E. The ALJ Erred in Substituting His Business Judgment as to the Need for Additional Supervision for that of Rite Aid's

The ALJ further asserts that *Bridgeport* is further distinguishable from Rite Aid's case because it represented a "sincere effort to provide onsite supervision…" 313 NLRB 542, 544 (1993); (D. 18:10-14). The employer in *Bridgeport*, according to the ALJ, proved an "*actual*, demonstrated need for unit employees to perform supervisory responsibilities…" (D. 18:32-36). In contrast, the ALJ, despite his factual findings to the contrary, asserts that Rite Aid "set forth, at most, a speculative need" for additional supervision. (D. 18:32-36). Because Rite Aid's "New York stores had operated for many years with just a supervisory pharmacy manager in charge" Rite Aid had not sufficiently asserted an "actual, demonstrated need for unit employees to perform supervisory responsibilities…" *Id.*

The ALJ's second-guessing of Rite Aid's legitimate business decision and uncontradicted testimony as to the reasons therefore is incredible. In *Bridgeport*, the employer operated ferry boats, and for *over 30 years* captains were specifically included in the bargaining unit's recognition

clause. 313 NLRB at 542. The employer then assigned supervisory responsibilities to the captains and removed them from the bargaining unit, even though "this proposed change did not coincide with any discernible objective event or cause, such as the rapid expansion of the Company, the imposition of new and burdensome government regulations, or a disaster that brought into focus the inadequacies of its previous supervisory hierarchy." *Id*. at 552. Nevertheless, the Board sided with the employer, finding that the employer was "entitled to make their own nondiscriminatory decisions as to how best to supervise their operations." *Id*. at 545. The Board deferred to the employer's "apprehension that only constant supervision on the vessels could guarantee the maintenance and orderliness it desired." *Id*. The Board further held that "**we may not simply substitute our own subjective judgment of what we would have done were we in the Respondent's position.**" *Id*. at 545. The ALJ did not provide Rite Aid with the same deference.

As the ALJ notes earlier in his decision, uncontested testimony from a New York Staff Pharmacist demonstrated that "his inability to discipline other employees for lateness or absences in New York **could be very disruptive to the pharmacy's workflow**." (D. 3:fn. 1). Rite Aid's Senior Labor Relations Manager explained in great detail how Rite Aid's proposal was the result of recent trends in the pharmacy industry resulting from the "transition from a pharmacist's medical dispensing to wellness" which began only three to five years ago. (D. 3:30-37). That same Manager testified regarding how Rite Aid's proposal was part of a nationwide shift at Rite Aid locations around the country, most recently in California. (D. 3:39-42). The ALJ heard uncontradicted testimony that Rite Aid's transfer of work proposal was part of a nationwide strategy, most recently implemented in two separate bargaining units in Norther and Southern California in 2015, for "pharmacists to continue to grow in the business and take on supervisory roles along with the current responsibilities that they have to meet the initiatives that the company is rolling out, wellness initiatives, and continue to supervise the associates within the pharmacy

department, technicians and cashiers, hire, fire, discipline, anything that's needed." (Tr. 170:14-171:1). Also in 2015, Rite Aid negotiated with UFCW locals in Southern California including the same type of language at issue in this case. (Tr. 171: 18-22). As a result, nearly everywhere else in the country, staff pharmacists and interns are considered part of management. The uncontradicted testimony also proved that the Union was aware of this nationwide strategy and the various California negotiations. (Tr. 173:21 - 174:22). For the ALJ to ignore his own findings of fact and the jurisprudence of the Board in *Bridgeport*, and instead find, without citing any evidence to the contrary, that Rite Aid had no "actual, demonstrated need" for additional supervision is absurd and the Board should reject it.

The admission of uncontradicted testimony by the ALJ of Rite Aid's clear, demonstrated need for additional supervision, is obviously stronger than the in the lack of supportive evidence from the employer as to the reason for transfer of work in *Bridgeport*. The only legal conclusion from the record is that the ALJ simply decided that he had better business judgment than Rite Aid and that the market and operations conditions supporting the transfer were insignificant. Indeed, the conclusion that Rite Aid had operated its stores with Pharmacy Manager Supervision as a basis for avoiding uncontradicted evidence of change in market and operational needs resembles a myopic manager clinging to the ways of the past and refusing to see facts which call for change. Certainly the ALJ's business judgment cannot override Rite Aid's business judgment, particularly when the General Counsel and the Union did not introduce any evidence to form a factual predicate for such a decision. In fact, the ALJ cannot point to a single factual finding to contradict Rite Aid's assertions.

The ALJ's conclusions about the reasons for the proposal to transfer work are not based on evidence or the law and they should be overturned.

F. The ALJ Erred in Holding that Rite Aid's Proposal Alters the Scope Because it Eliminates a Bargaining Unit Classification

It is difficult to discern the ALJ's remaining arguments in his Decision. However, to the extent that he finds that Rite Aid's proposal alters the scope of the unit by eliminating a bargaining unit position, this holding has no legal or factual basis. The effects of Rite Aid's proposal on the size of the unit has no significance under Board law, and in any event Rite Aid's proposal leaves the bargaining unit unchanged.

1. The Elimination of a Bargaining Unit Position is Irrelevant

The ALJ appears to find that Rite Aid's proposal alters the scope of the unit because he believes that it "effectively eliminates positions" from the bargaining unit. (D. 17:5-7). In support of this finding, the ALJ relies on *Holy Cross Hospital* for the proposition that a proposal which resulted in the "virtual elimination" of a bargaining unit position also changes the scope of the unit. 319 NLRB 1361, 1364-1365 (1995); (D. 17:9-20). The ALJ further relies on *Hill-Rom Co. v. NLRB* for the holding that "once a specific job has been included within the scope of the unit" then the employer "cannot remove the position" without securing the consent of the union. 957 F.2d 454, 456 (7th Cir. 1992); (D. 17:9-20).

As discussed above, the D.C. Circuit decisively rejected the view that the loss of unit positions automatically altered the scope of the bargaining unit. *Aggregate Industries v. NLRB*, 824 F.3d 1095 (D.C. Cir. 2016). The fixation on the end result of the proposal was a "red herring." *Id*. at 1100. Likewise, in *Hill-Rom Co.*, on which the Board relied upon in *Holy Cross Hospital* relied upon, the Seventh Circuit approved a transfer of work which resulted in the elimination of a bargaining unit position specifically included in the unit recognition clause. *Hill-Rom Co.*, 957 F.2d at 454.

The ALJ, by relying on *Holy Cross*, makes the same mistake as the Board in *Aggregate Industries*. He is fixating on the end result, the perceived loss or elimination of bargaining unit work and positions. Under this analysis, repeatedly rejected by the courts, virtually no transfer of work could occur, and the Board's distinction between transfer of work and a change in the scope of the unit would become meaningless. *See Aggregate Industries v. NLRB*, 824 F.3d 1095 (D.C. Cir. 2016); *Hill-Rom Co. v. NLRB*, 957 F.2d 454 (7th Cir. 1992).

2. Rite Aid's Proposal Does Not Result in the Elimination of a Bargaining Unit Classification

Even assuming, *arguendo*, the determination of whether Rite Aid's proposal actually eliminated a classification is a relevant inquiry, the proposal **does not eliminate a bargaining unit position**. Rite Aid's proposal gives future Staff Pharmacists supervisory job responsibilities, thereby making them supervisors as defined by the Act. (D. 3:31-37). Future Staff Pharmacists will perform standard Section 2(11) supervisor and management responsibilities, including hiring, firing, disciplining, training, and generally supervising the pharmacy. *Id*. They will also perform traditional pharmacist job responsibilities, such as meeting with patients and filling prescriptions. *Id*. These traditional pharmacist responsibilities are currently performed by Staff Pharmacists included in the bargaining unit. *Id*.

Rite Aid's proposal does not eliminate any current bargaining unit positions. Current Staff Pharmacists, as non-supervisory associates, remain in the unit, unchanged in every respect.[5] At bargaining on March 31, 2015, when Rite Aid introduced its proposal, Rite Aid explained that only future Staff Pharmacists would be excluded from the bargaining unit. (D. 3:9-12). Rite Aid

[5] Rite Aid employed approximately 471 bargaining unit Staff Pharmacists prior to introducing its proposal. After Rite Aid's proposal goes into effect, it will *still employ approximately 471 bargaining unit Staff Pharmacists*.

did not propose that it current Staff Pharmacists be removed or have their positions altered in any way.

Additionally, unlike in *Holy Cross Hospital,* Rite Aid has not proposed to eliminate a bargaining unit position *specifically* included in the scope of the unit. The Staff Pharmacist position, unlike the HS position altered in *Holy Cross Hospital*, is not mentioned in the Parties' CBA recognition clause. (D. 2:25-37). Rite Aid's proposal therefore does not eliminate a "specific job" which was included within the recognition clause. Rite Aid is hiring new Staff Pharmacists as Section 2(11) supervisors, excluded from the bargaining unit, and giving them work traditionally performed by the bargaining unit. As described above, Rite Aid is not proposing any change to any current bargaining unit member.

Rite Aid proposed that future Staff Pharmacists act as managers and supervisors. The ALJ has no basis with which to substitute in his own judgment of that decision. He cannot invent new legal theories to undermine Rite Aid's management of its pharmacies. He points to no evidence suggesting Rite Aid's proposal is a ruse designed to break up the Union. The Union must be required to bargain over Rite Aid's proposal.

IV. CONCLUSION

As described above, the ALJ made material findings and reached erroneous conclusions. The Board should reverse the ALJ's Decision and dismiss the Complaint.

Dated: January 18, 2017

Respectfully submitted,

By /s/ Laura Pierson-Scheinberg

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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing was sent by electronic mail on this 18th day of January, 2017 to the following:

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